

No. 1-13-0234

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>In re</i> ESTATE OF PATRICIA HERARD, a)	Appeal from the Circuit Court
Disabled Person (Patricia Herard, Respondent-)	of Cook County, Illinois
Appellant, v. Adam M. Stern, Guardian Ad Litem,)	Probate Division
Petitioner-Appellee).)	
)	
)	No. 09 P 000366
)	
)	Honorable
)	Cheryl Cesario,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

ORDER

Held: The trial court's removal of the plenary guardian was not against the manifest weight of the evidence where the guardian acknowledged she did not administer seizure medication as prescribed by a physician, and the ward was not receiving recommended services.

¶ 1 Respondent, Patricia Herard, appeals the order of the circuit court granting petitioner

Adam M. Stern's petition for a citation to remove Ms. Herard as guardian of her adult daughter.

On appeal, Ms. Herard contends (1) the court's order ignored Illinois public policy and violated her due process right to the care, custody, and control of her child; (2) in granting Mr. Stern's petition, the court considered inadmissible evidence and failed to consider relevant evidence. For the following reasons, we affirm.

¶ 2 JURISDICTION

¶ 3 The trial court entered an order granting the citation to remove Ms. Herard's guardianship on October 5, 2012. On November 2, 2012, Ms. Herard filed a motion to vacate the order, which the trial court denied on December 11, 2012. Ms. Herard filed a notice of appeal on January 7, 2013. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).¹

¶ 4 BACKGROUND

¶ 5 On February 24, 2009, Patricia Herard, who was 18 years old at the time, was adjudicated a disabled person. The court appointed her mother, also named Patricia Herard (hereinafter referred to as Mrs. Herard), as plenary guardian of her person. The court appointed Bank of America plenary guardian of Patricia's estate, which was valued at approximately \$2 million.

¹Petitioner argues that Ms. Herard failed to file her notice of appeal in a timely manner and therefore this court lacks jurisdiction to consider her appeal. He bases his argument on the fact that the trial court issued the citation on October 5, 2012, and Ms. Herard filed her notice of appeal on January 7, 2013, more than 30 days later. However, petitioner did not account for the fact that Ms. Herard filed a timely posttrial motion to vacate. Since Ms. Herard filed her notice of appeal within 30 days of the trial court's disposition of her motion to vacate, her appeal is timely and we have jurisdiction to consider her arguments. See R. 303(a)(1) (eff. May 30, 2008).

Incorporated into the appointment order was an agreement signed by Mrs. Herard, Mr. Herard (Patricia's father), Mr. Stern as guardian *ad litem* (GAL), and Bank of America. Paragraph 5 of the agreement states that the appointed case manager, Rehab Assist Guardianship Services (Rehab Assist), "as long as Patricia Herard (the ward) lives in the parents' home, shall never be denied reasonable access to Patricia while Rehab Assist is the court-appointed case manager. This shall include announced and reasonable unannounced visits." A report filed by Benjamin Topp, Rehab Assist's director of case management services, noted that Patricia "has a diagnosis of Profound Mental Retardation and Legal Blindness" and "exhibits behaviors seen in individuals with autistic spectrum disorders." The report also stated that according to tests administered by Patricia's school, Patricia functions "in the age ranges of 9 months to just under 3 years with most of her testing scoring her at about 18 months."

¶ 6 On July 23, 2009, the GAL filed a petition for the issuance of a citation for removal of Mrs. Herard as guardian of Patricia's person. He filed the petition "due to [Mrs. Herard's] failure to cooperate with Rehab Assist." After several court appearances after which Mr. and Mrs. Herard agreed to work with a behavior modification specialist and allow Rehab Assist to monitor the case, the citation was withdrawn and Patricia continued to reside with her parents. On July 23, 2010, the GAL filed a supplement to the petition, stating that the Herards did not cooperate with court orders and refused to sign consents for assessments by Rehab Assist. The petition also alleged concerns "including but not limited to" Patricia's living conditions in the Herard's home, her lack of medical insurance, and a need for other services for Patricia. The petition further alleged that Ms. Herard did not communicate or meet with the case manager or estate guardian to

address these issues. The trial court ordered that the GAL's petition "shall issue pursuant to the Petition and Supplement thereto," and that the Herards "must cooperate with all recommendations of the service providers including cooperation with the temporary relocation and respite services." The case was continued for status on compliance and other pending matters.

¶ 7 On November 2, 2011, Patricia suffered from "seizure activity" at her school and was sent to the emergency room. Patricia had been prescribed Depakote, a seizure medication, after a prior seizure episode. Dr. Wesley Eilbert, a neurologist, had advised Mrs. Herard at the time to administer the medication twice daily to treat the seizures. Mrs. Herard, however, did not give Patricia the medication and blood work performed on November 2, 2011, showed negligible amounts of medication in Patricia's system.

¶ 8 On November 4, 2011, the GAL filed an emergency petition for issuance of a citation for removal of guardian of the person and to appoint a temporary guardian. The petition alleged that Patricia was recently hospitalized for psychiatric reasons and upon discharge, the hospital staff recommended placement of Patricia outside her home in order to meet her needs. The petition alleged that Mrs. Herard "rejects" that plan. The petition also requested a temporary guardian pending resolution of the citation to remove because Mrs. Herard refused to give Patricia the prescribed seizure medication. That same day the trial court appointed Rehab Assist as temporary guardian of Patricia's person.

¶ 9 The trial on the petition for citation to remove began on September 19, 2012. On September 21, 2012, attorneys for Ms. Herard filed the following motions: a motion *in limine* to

strike any testimony "broader than allegations within the Emergency Petition" and the petition to appoint a successor guardian, which was filed on December 5, 2011; and a motion to dismiss the petitions for appointment and for citation to remove for failure to attach a hospital report pursuant to 755 ILCS 5/11a-9 (West 2010). In response, the GAL argued that (1) Ms. Herard waived her right to object to the pleadings; (2) the motions are untimely since they were filed after the trial had commenced; and (3) the petitions are in compliance with the Probate Act. The trial court denied these motions on September 24, 2012.

¶ 10 At the trial on the petition, the parties presented witnesses and exhibits including extensive medical reports and records. The trial court reviewed the evidence, noting Patricia's hospitalization after her seizure activity in October of 2011, and her ultimate discharge on October 11, 2011. The court found that upon discharge, Dr. Eilbert advised administering 500 milligrams of Depakote twice a day to treat Patricia's seizure activity. The trial court also viewed a videotape taken during one of Patricia's episodes. Mrs. Herard's witness, Dr. Molohan, testified that he did not see Patricia shaking on the videotape, which is usually indicative of a seizure. However, on cross-examination Dr. Molohan admitted that one could have a seizure without shaking. The trial court noted that it did not see shaking either, but in the video "there's always an obstruction, or the camera is so out of focus."

¶ 11 The court noted that other reports have noted that Patricia had recently suffered from seizures. In a report from November 2, 2011, Dr. Geannie Rhee indicated that Patricia had lost consciousness and was slumped in a chair. A social worker noted that Patricia was having at least one seizure per week, but was not receiving Depakote because her parents do not believe

that she has epilepsy. Doctors believed that Patricia's seizure activity was likely due to medication noncompliance. They tried to reach Mr. and Mrs. Herard multiple times on November 2, 2011, but the Herard's did not respond. Patricia was again prescribed Depakote, but her parents did not administer the medication to her. The trial court noted that Mrs. Herard acknowledged her refusal to give Patricia the medication "in open court" during the trial on the petition.

¶ 12 The trial court also noted evidence that Patricia's aggressive behavior was "worsening" and "needed to be stabilized to prevent harm to herself and others." The court stated that Patricia "has a history of self-injurious behaviors including head banging, arm flailing, striking walls, putting holes in walls, striking bed bars and people. In addition, in those medical records she punched a caretaker in the stomach, a hospital employee, kicked another in the leg, and scratched people as well."

¶ 13 The trial court concluded that the "evidence was uncontradicted that Patricia Herard suffered a seizure." It believed that Mrs. Herard was "in denial as to her daughter's medical condition" and "does not understand the need for structure in the life of a developmentally delayed individual, even as to the small things like being able to sit at a table and feed herself. [Mrs. Herard's] continual need to bathe and change [Patricia's] diaper are excessive. And whenever an incident occurs, it's always a misunderstanding. This Court has endured a number of misunderstandings and given the benefit of the doubt to [Mrs. Herard] over the last three years." The court also stated that Mr. and Mrs. Herard "are very connected to their daughter and love their daughter very much. But their behavior and their lack of cooperation around

medication management, the requests of the Court around the need for behavioral training and skills at this time does not make [Mrs. Herard] an appropriate decision maker on behalf of her daughter." In an order dated October 5, 2012, the trial court removed Mrs. Herard as guardian of Patricia's person pursuant to sections 9 and 10 of the Illinois Probate Act, 755 ILCS 5-23/2 (West 2010) (Probate Act), finding her "unsuitable to discharge the duties related to making medical decisions including medicine dispensation and management on behalf of her daughter."

¶ 14 The trial court, however, ordered the estate to pay for Mrs. Herard to learn behavior management techniques on how to interact with Patricia, and how to provide a "safe and healthy environment" in her home. The court ordered continued visitation for Patricia's parents, and for the estate to fix Mrs. Herard's car so that she can visit her daughter. Mrs. Herard filed a motion to vacate the order, which the trial denied on December 11, 2012. This timely appeal followed.

¶ 15 ANALYSIS

¶ 16 Ms. Herard contends that the trial court erred in removing her as plenary guardian of Patricia. Pursuant to the Probate Act, the guardian for disabled adults "shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance." 755 ILCS 5/11a-17(a) (West 2010). However, the Probate Act provides that the trial court may remove a guardian for reasons including "good cause." 755 ILCS 23-2(a). This court has determined that "good cause" can encompass actions other than the guardian's malfeasance or misfeasance. *In re Estate of Debevec*, 195 Ill. App. 3d 891, 896 (1990). The petitioner initially has the burden of presenting evidence at the hearing to establish reasonable grounds for removal. *In re Estate of Austwick*, 275 Ill. App. 3d 665, 671 (1995). If the petitioner meets this burden,

then the respondent must prove her fitness to retain office. *Id.* A reviewing court will uphold the trial court's determination unless it is against the manifest weight of the evidence. *Id.* at 897.

¶ 17 Initially, Ms. Herard objects to the reasonable grounds for removal standard used in *Austwick*. She argues that when a parent is the guardian cited in a removal petition, her due process right to the care, custody, and control of her child is implicated. Therefore, she contends, removal of the parent as guardian requires that the petitioner show by clear and convincing evidence that the parent is unfit to serve as guardian. Ms. Herard acknowledges she has found no Illinois cases directly addressing this issue. Instead, she cites Illinois cases holding that the termination of parental rights is a constitutional issue requiring clear and convincing evidence of unfitness. She also cites two federal cases, *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), and *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), which overturned *Bell*. Both *Bell* and *Russ* involved a lawsuit filed under federal statute by parents of a victim of a police shooting. The parents sought recovery for the lost companionship of the victim. *Bell*, 746 F.2d at 1214; *Russ*, 414 F.3d at 783. However, these cases are inapposite since the issue before this court involves neither the termination of parental rights, nor recovery under federal statute for parents of a police shooting victim. We adhere to the standard adopted in *Austwick*, that the party filing the petition present evidence showing reasonable grounds for removal. *Austwick*, 275 Ill. App. 3d at 671.

¶ 18 The trial court removed Mrs. Herard as plenary guardian of Patricia pursuant to sections 9 and 10 of the Probate Act. These sections allow the court to remove a representative if he or she "becomes incapable of or unsuitable for the discharge of the representative's duties" or for "other

good cause." 755 ILCS 5/23-2(a)(9), (10) (West 2010). At the trial on the petition, the GAL presented evidence of Patricia's history of seizure activity. After an earlier episode, neurologist Dr. Eilbert prescribed Depakote to treat the seizures. He advised Mrs. Herard to give Patricia the Depakote twice a day, but Mrs. Herard did not comply. On November 2, 2011, Patricia had a seizure at her school and was sent to the hospital. Blood work showed that Patricia had negligible amounts of medication in her system. The doctors also tried to contact the Herards but they could not immediately be reached. Patricia was again prescribed Depakote, but Mrs. Herard did not administer the medication because she did not believe Patricia had epilepsy. Mrs. Herard acknowledged in open court that she did not comply with the doctor's orders.

¶ 19 Prior to the filing of the emergency petition to remove on November 4, 2011, Patricia was hospitalized for psychiatric reasons and the hospital staff recommended that she be placed outside the home for services. Mrs. Herard rejected the plan. The trial court noted that Patricia showed "worsening" behavior that was aggressive and potentially harmful to herself and others. These behaviors included head banging, arm flailing, striking walls, putting holes in walls, striking bed bars and people. The court believed that Patricia needed services to stabilize these behaviors but Mrs. Herard was in denial as to Patricia's condition and her need for services. We find that the GAL presented evidence showing reasonable grounds for removal of Mrs. Herard as Patricia's plenary guardian, and the trial court's determination is not against the manifest weight of the evidence.

¶ 20 Ms. Herard, however, argues that we should reverse the trial court's determination because it "ignored the public policy of Illinois to keep families together." She argues that "[i]t is

the public policy of Illinois that a relative would be more solicitous of an incompetent's welfare than would a non-relative," citing *Debevec*, 159 Ill. App. 3d at 898. In *Debevec*, the public guardian appealed an order of the trial court removing her as guardian and appointing the ward's sister as guardian. *Id.* at 893. In considering the sister's removal petition, the trial court took into account the fact that no formal notice was ever sent to the ward's relatives regarding guardianship after the ward was declared a disabled adult, and that the ward herself indicated she preferred her sister as her guardian. *Id.* at 894. No one had significant concerns about the sister as guardian, and the *Debevec* court noted that appointing the sister as guardian would enable the public guardian to spend more time on cases where a relative is not willing to serve in that capacity. *Id.* at 897. The court cautioned, however, that it "in no way impl[ies] it is enough that a relative desires to be appointed guardian in order to remove a guardian." *Id.* A determination to remove a guardian must take into account the record as a whole. *Id.* Taking the record as a whole, the GAL presented evidence here showing a reasonable grounds for removal. We are not persuaded by Mrs. Herard's argument that the trial court's determination violates Illinois public policy.

¶ 21 Mrs. Herard also argues that a hospital report the trial court referred to must be ignored because it was not attached as required by 755 ILCS 5/11a-9 (West 2010). Mrs. Herard does not elaborate on this argument, nor does she cite authority in support of her position. Therefore, she has waived consideration of this issue pursuant to Illinois Supreme Court Rule 347(h)(7) (Ill. S. Ct. R. 347(h)(7) (eff. Sept. 1, 2006)), which states that a point raised in a brief but not supported by citation to relevant authority is forfeited.

¶ 22 Mrs. Herard further contends that the trial court erroneously considered issues not raised

in the removal petition. Specifically, the trial court discussed Patricia's prior seizures, self-injurious acts, and the Herard's failure to communicate and cooperate with the court and guardian. Mrs. Herard also takes issue with the trial court's consideration of her bathing and changing of Patricia, and the references to Patricia's need for structure in her life. She contends that these allegations go beyond those found in the citation and therefore she had no notice of the allegations prior to trial. As support, she cites *In re Arthur H., Jr.*, 212 Ill. 2d 441 (2004).

¶ 23 *In re Arthur H.*, however, involved the issue of whether to adjudicate a minor child as a ward of the court pursuant to the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2010)). It did not concern the removal of a plenary guardian under the Probate Act, as we have in the case at bar. Furthermore, taking into account both the supplemental petition and the emergency petition filed by the GAL, Mrs. Herard had sufficient notice of the allegations. The original petition cited Mrs. Herard's failure to cooperate with Rehab Assist, but the petition was withdrawn when she agreed to work with a behavior modification specialist. However, when she did not comply, the GAL filed a supplemental petition citing Mrs. Herard's failure to cooperate with court orders and her refusal to sign consents for assessments by Rehab Assist. It also cited to concerns "including but not limited to" Patricia's living conditions in the Herard's home, her lack of medical insurance, and a need for other services for Patricia. The petition further alleged that Mrs. Herard did not communicate or meet with the case manager or estate guardian to address these issues.

¶ 24 We are not persuaded by Mrs. Herard's argument. "The purpose of the citation is to notify the respondent about the alleged causes for removal and to give [her] an opportunity to

defend at a hearing." *In re Estate of Austwick*, 275 Ill. App. 3d 665, 671 (1995). Although the petitions did not specifically allege certain behaviors, such as bathing or diaper changing, the allegations sufficiently placed Mrs. Herard on notice that her failure to cooperate with the court and guardian, and Patricia's living conditions and need for services, were cause for removal.

¶ 25 Finally, Mrs. Herard contends the trial court erred in failing to consider relevant evidence: specifically, the treatment of Patricia at Diane Homes, which Rehab Assist selected for Patricia's placement. However, Mrs. Herard acknowledges in her brief that the trial court admitted this evidence. Her contention is that the trial court should have given the evidence greater significance. It is within the province of the factfinder to assess the evidence, and this court will not substitute its judgment on questions involving what weight to give evidence or the credibility of witnesses. *People v. Moore*, 375 Ill. App. 3d 234, 238 (2007).

¶ 26 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.